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No. 75-1684

In the Supreme Court of the United States

OCTOBER TERM, 1976

CITY OF NEW YORK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner challenges the constitutionality of the air passenger ticket excise tax provided by Section 4261 of the Internal Revenue Code of 1954 (26 U.S.C.), as applied to its individual employees travelling on official business of the City of New York. In this refund suit brought in the United States District Court for the Southern District of New York, the district court upheld the tax on the authority of *New York* v. *United States*, 326 U.S. 572 (Pet. App. 1a-25a). The court of appeals affirmed without opinion (Pet. App. 26a-27a).

1. Section 4261(a) of the Code imposes a tax equal to eight percent of the amount paid for taxable air transportation.[1] The statute was originally enacted in 1941 as a

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[1]Section 4262 of the Code defines taxable transportation, generally, as domestic air transportation. Section 4261(d) provides that the tax

tax on the transportation of persons by rail, motor vehicle, and water, as well as by air.[2] In 1970, the air passenger tax was the subject of considerable congressional attention in connection with the enactment of the Airport and Airway Development and the Airport and Airway Revenue Acts of 1970, 84 Stat. 219, 236. This legislation provides for substantial expansion and improvement of the airport and airway system to be funded "through the imposition and application of airport and airway user chargers" (H.R. Rep. No. 91-601, 91st Cong., 1st Sess. 1 (1969)), including the air passenger ticket excise tax of Section 4261. See H.R. Rep. No. 91-601, *supra*, at 38; S. Rep. No. 91-706, 91st Cong., 2d Sess. 5 (1970).

The direct link between the Development Act and the excise tax was established by Section 208 of the Airport and Airway Revenue Act, 84 Stat. 250, which created the Airport and Airway Trust Fund. The taxes collected under the Revenue Act, including the air passenger ticket excise tax, were appropriated to this fund, from which the airport development expenditures are to be made. At that time, Congress eliminated the exemptions previously granted to state and local governments and to the federal government (Section 205(a)(2) and (3) of the Airport and Airway Revenue Act, 84 Stat. 241).

2. Petitioner urges (Pet. 10-23) this Court to clarify the law regarding the implied constitutional immunity of

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shall be paid by the person making the payment subject to tax, and Section 4291 requires that the person receiving a taxable payment collect the tax and pay it over to the United States.

[2]Section 3469 of the Internal Revenue Code of 1939 (26 U.S.C. 1952 ed.), the predecessor to Section 4261 of the 1954 Code, was added by Section 554(b) of the Revenue Act of 1941, 55 Stat. 721. The tax on transportation other than by air was eliminated by Section 5(b) of the Tax Rate Extension Act of 1962, 76 Stat. 115.

the states and their political subdivisions from federal taxation. But as the above-described legislative history of the air transportation excise tax demonstrates, the tax is "a charge for services rendered and represents a quid pro quo, and as such, is outside the scope of the doctrine of implied intergovernmental tax immunity." *State of Texas* v. *United States*, 30 A.F.T.R. 2d 5935, 5938 (W.D. Tex.), affirmed *per curiam*, 31 A.F.T.R. 2d 1473 (C.A. 5). These taxes or "charges" are specifically earmarked for air transportion development, and are paid into the Airport and Airway Trust Fund established solely for that purpose. Moreover, in withdrawing the exemptions from this tax previously extended to various governmental and educational organizations, the House Committee Report stated that "* * * since this tax is now generally viewed as a user charge * * * there would appear to be no reason why these governmental and educational organizations should not pay for their share of the use of the airway facilities." H.R. Rep. No. 91-601, *supra*, at 46. See also 114 Cong. Rec. 8987 (1968).

In substantially analogous cases, this Court has held that charges for services rendered by state and local governments for pilotage or wharfage, even though graduated by tonnage, do not violate Article I, Section 10, Clause 3 of the Constitutuion, which provides that "[n]o State shall * * * lay any Duty of Tonnage." See, *e.g.*, *Clyde Mallory Lines* v. *Alabama*, 296 U.S. 261; *Huse* v. *Glover*, 119 U.S. 543; *Packet Co.* v. *St. Louis*, 100 U.S. 423; *Packet Co.* v. *Keokuk*, 95 U.S. 80. Cf. *The Minnesota Rate Cases*, 230 U.S. 352, 405. See also *Head Money Cases*, 112 U.S. 580, 596. Similarly, the Court has upheld state motor vehicle license and registration fees levied as compensation for the use of highway facilities furnished by the state (see *e.g.*, *Hendrick* v. *Maryland*, 235 U.S. 610; *Aero Transit Co.* v. *Commissioners*, 332 U.S. 495). Finally, the Court has sustained state and local enplaning charges

upon commercial airline passengers as compensation for the use of state-provided airport facilities (*Evansville Airport* v. *Delta Airlines*, 405 U.S. 707), against the challenge that, because they were imposed upon vehicles or passengers in interstate as well as intrastate commerce, they interfered with the former. As stated in *Hendrick* v. *Maryland*, *supra*, 235 U.S. at 623-624, "* * * there can be no serious doubt that where a State at its own expense furnishes special facilities for the use of those engaged in commerce, interstate as well as domestic, it may exact compensation therefor."[3]

Here, too, the passenger ticket tax is a payment by the user for airport and airway facilities furnished by the federal government. Thus, petitioner can no more claim the right to free use of these facilities than it could, for example, post its mail without purchasing stamps.[4]

3. Finally, petitioner's claim that there is an implied immunity of the states and localities from federal taxation has long been discredited. The Court originally recognized such an immunity in *Collector* v. *Day*, 11 Wall. 113, except where the states engage in business of a private nongovernmental character (see, *e.g.*, *South Carolina* v. *United States*, 199 U.S. 437; *Ohio* v. *Helvering*, 292

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[3]Although petitioner complains (Pet. 32-34) that there is no "factual background" to demonstrate that the taxes were commensurate with the value of its use of the airport facilities, the burden was upon it to show that the charges did not bear a reasonable relationship to the services provided. See *Evansville Airport* v. *Delta Airlines*, *supra*, 405 U.S. at 719-720; *Hendrick* v. *Maryland*, *supra*, 235 U.S. at 624.

[4]The district court in *State of Texas* v. *United States*, *supra*, 30 A.F.T.R. 2d at 5938, also sustained the passenger ticket tax as applied to the states as a valid exercise by the Congress of its power to regulate interstate commerce. See *Board of Trustees* v. *United States*, 289 U.S. 48. But that issue need not be reached here in light of the status of the tax as a user charge. Compare *National League of Cities* v. *Usery*, Nos. 74-878, 74-879, decided June 24, 1976.

U.S. 360). But in *Helvering* v. *Gerhardt*, 304 U.S. 405, the Court sustained a federal income tax on salaries of employees of the bi-state Port of New York Authority. In so holding, the Court reaffirmed the distinction drawn by Mr. Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316, between the position of the national government (acting with powers of supremacy under the Constitution) and the states, which are not accorded such preeminent powers.

Similarly, in *New York* v. *United States*, 326 U.S. 572, upon which the district court relied (Pet. App. 13a-20a), the Court upheld a federal tax upon the sale of mineral water by the State of New York. While the case could have turned upon the distinction drawn in the earlier cases between governmental and private activities, none of the opinions of the members of the Court voting to sustain the tax rested upon that narrow ground. Rather, under the various tests suggested in the plurality opinions, the air passenger tax at issue here would be valid.

Those tests are: (1) whether the tax is nondiscriminatory (326 U.S. at 582-584, Frankfurter, J.); (2) whether Congress expressly stated its intention that the tax apply to governmental organizations (*id.* at 584-586, Rutledge, J.); and (3) whether the tax unduly interferes with the performance of the sovereign functions of government, in the sense of actual impairment of state or city functions (*id.* at 586-590, Stone, C.J.). See also McCormack, *Intergovernmental Immunity and the Eleventh Amendment*, 51 North Carolina L. Rev. 485, 493 (1973). Indeed, it is hardly surprising that shortly after the decision in *New York* v. *United States*, *supra*, one commentator concluded that "since the beginning of 1938, it is apparent that the Court has rejected the reciprocal rule of immunity, returned to the basis of earlier decisions and reaffirmed Chief Justice Marshall's understanding that the immunity

doctrine protected the Federal Government against taxation by the states but did not equally shield the states against the exercise of the delegated and supreme taxing power of the Federal Government." Rakestraw, *The Reciprocal Rule of Governmental Tax Immunity—A Legal Myth*, 11 Fed. Bar J. 3, 27 (1950).

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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